Nos. 24-38 and 24-43

In the Supreme Court of the United States

BRADLEY LITTLE, Governor of Idaho, et al.,
Petitioners,
v.
LINDSAY HECOX, et al., *Respondents.*

WEST VIRGINIA, et al., *Petitioners,*
v.
B.P.J., BY HER NEXT FRIEND AND MOTHER, HEATHER JACKSON, *Respondent.*

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH AND FOURTH CIRCUITS

BRIEF OF *AMICI CURIAE* PENNSYLVANIA SCHOOL BOARD DIRECTORS IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Regulations

Other Authorities

INTEREST OF *AMICI CURIAE*[1]

Amici are 55 school board directors[2] from 21 Pennsylvania school districts that have passed policies separating students based on sex for athletics or facility use. Amici have been forced to navigate changing and sometimes conflicting guidance in an artificially complicated area of the law. Their North Star has been to seek the good of all students in their districts by crafting policy based on the long-standing reasons why we separate the sexes—providing athletic opportunities, safety, and fairness in the case of sports and protecting privacy and avoiding sexually harassing environments in the case of facility use. Since athletic activity necessarily involves private spaces such as locker rooms and showers, amici understand these issues to be intertwined.

Amici write to ask this Court to resolve this issue by recognizing that separation is necessary to comply with both Title IX and the Constitution. Amici's expertise in navigating these issues will be of benefit to this Court.

SUMMARY OF ARGUMENT

Title IX and the Constitution both recognize that in limited circumstances, sex-based distinctions are not only permissible but required. Athletics and privacy facilities are among those contexts.

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[1] No party's counsel authored any part of this brief. No person other than amicus and amicus' counsel contributed any money intended to fund the preparation or submission of this brief.

[2] See Appendix.

Separation by sex ensures fairness and safety in sports, and it protects the fundamental right to bodily privacy in intimate settings such as locker rooms, showers, and restrooms.

While nondiscrimination principles work to erase most sex-based distinctions, sex-based separation in athletics and privacy facilities is still necessary. Attempts to conflate gender identity with sex cannot change the analysis, because the important interests in separation only apply to sex.

Many advocates have misused the holding in *Bostock* v. *Clayton County*, 590 U.S. 644 (2020). But *Bostock* itself recognized it was not addressing "bathrooms, locker rooms, or anything else of the kind." *Id*. at 681. The "but-for" test in *Bostock* applies only where sex-based distinctions are otherwise unlawful. Where, as here, the law expressly permits sex-based separation, *Bostock* provides no basis for separation based on gender identity.

Schools have a duty to respect every student, including those who identify as transgender. But respect does not require erasing biological reality or dismantling the protections Title IX enshrines. Children should not be pressured to think that if they do not forgo athletic opportunities or undress in front of the opposite sex, they are expressing hate. Instead, it is gender ideologues that manipulate children—including trans-identifying children—with these lies.

Policies separating students by sex in athletics and privacy facilities reflect long-standing constitutional and statutory principles, and they

serve important community and governmental interests. This Court should confirm that such distinctions are not only lawful but essential.

ARGUMENT

I. Sex-separation is warranted not because sex is a protected class, but in spite of the fact.

Separation of protected classes is almost always prohibited. Yet, separating privacy facilities and athletics on the basis of sex is an exception. When Title IX and the Equal Rights Amendment were both being debated, questions were raised as to what sex-based protections would mean for sports and for bodily privacy in intimate settings. The fear was that this would result in all coed teams and all coed locker rooms, showers, and restrooms. The answer was, and continues to be, that there are important justifications for sex-based separation: athletic opportunities, safety, and fairness in the case of sports and our need for bodily privacy from members of the opposite sex due to the anatomical differences that are exposed in private settings. In short, some sex-based distinctions are required in order to protect constitutional rights and to carry out Title IX's purpose.

Ruth Bader Ginsburg directly addressed the contention that bathrooms would be opened to both men and women. She stated in 1975 regarding the proposed Equal Rights Amendment, "[S]eparate places to disrobe, sleep, perform personal bodily

functions are permitted, in some situations required, by regard for individual privacy. Individual privacy, a right of constitutional dimension, is appropriately harmonized with the equality principle." Ruth Bader Ginsburg, *The Fear of the Equal Rights Amendment*, WASH. POST, Apr. 7, 1975, at A21.

A. Sex-based sports and privacy facilities make distinctions based on sex, and do not make distinctions based on gender identity.

While female teams and sex-based privacy facilities do make distinctions based on sex, they do not make any distinctions based on gender identity. All females, regardless of whether they identify differently, are entitled to try out for a female athletic team and use female privacy facilities. Simply put, these are sex-based distinctions, not gender identity-based distinctions.

Gender identity is not sex.[3] It does not carry the same interests and therefore cannot supplant sex as a basis of separation. Despite the spurious accusations from activists that common sense separation is somehow "gender-identity discrimination," the opposite is true. Sex-based separation does not make any distinction at all on gender identity. However, when an entity separates

[3] Gender ideology requires reference to fixed biological sex to even make sense of itself. When a person identifies as transgender, they simultaneously communicate that they know their sex in order to identify as something else.

on the basis of gender identity, it then discriminates on that basis.[4]

Advocates suggest that those who assert a cross-sex identity must be affirmed in that identity by being accepted as a member of that sex. But affirmation of affiliation with a group cannot justify separate teams or facility use regardless of whether we would be seeking to affirm gender identity, sexual orientation, religion, or race. All such separation is unjustifiable discrimination. Sex separation in privacy facilities and sports does not rely at all on "affirmation" or "group affiliation" justifications, and it alone possesses the important interests that justify separation as stated more fully in Section IV, *infra*.

B. Assertions that gender-identity discrimination is inherent in sex-based sports or privacy facilities is built on a false premise.

Some allege that sex-based privacy facilities and athletic teams constitute gender-identity discrimination because everyone gets to use the locker room or sport of their gender identity, except for those who identify as transgender. This argument starts with a false premise in order to achieve a desired conclusion. State law and school policy that

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[4] Gender identity-based separation also suffers from an additional internal inconsistency by ignoring non-binary gender identities. If sex-based distinctions no longer provide sufficient justification for separation, there is even less justification for separating privacy facilities and teams based on "boy" or "girl" gender identities while inherently excluding non-binary identities.

separate sex-based privacy facilities or athletic teams do so while including all other classes, not discriminating against them. For example, every gender identity is welcome on both teams and in both locker rooms just as every race, religion and national origin is welcome on both teams and in both locker rooms. The sex of the participant is the only distinction made. These laws discriminate on sex, not gender identity. *Adams* v. *Sch. Bd. of St. Johns Cty.*, 57 F.4th 791, 808 (11th Cir. 2022) ("To say that the bathroom policy singles out transgender students mischaracterizes how the policy operates.")

II. The logic of *Bostock* only extends gender identity-based protections when the underlying sex-based distinction is illegal.

The test laid out in *Bostock* v. *Clayton County*, 590 U.S. 644 (2020), is clear along with this Court's statement that it did not "purport to address bathrooms, locker rooms, or anything else of the kind." *Id.* at 681. However, advocates have fostered confusion that requires clarification by this Court. *Bostock* does not justify the policy change that respondents demand. The logic of *Bostock* functions differently in the context of privacy facilities and sports than it does in employment decisions. The "but-for" test allows gender identity to piggyback on a sex discrimination claim when and only when there is underlying illegal sex-based discrimination.

Consider a male employee fired from a big box store solely for identifying as a transwoman. The logic of *Bostock* says "but for" the fact that the employee is

male, the employee would still have a job, and it is generally illegal to fire men or women on the basis of sex. However, this does not work the same way when it is legally permissible to make sex-based distinctions. Consider this true statement: But-for the fact that person A is male, they would be permitted to use the female privacy facilities or join the female sports team. This clearly constitutes a distinction on the basis of sex. But the underlying sex distinction is legal.

The result is no different if person B is male and happens to identify as a "transwoman," "demigender," "two-spirit," or something else. But-for the fact that person B is male, they would be permitted to use the female locker room or join the female team. As in the first example, the underlying sex distinction is legal, so the *Bostock* "but-for" test does not work for that male either.

There is a second reason *Bostock*'s test does not apply to sex-based athletics or privacy facilities. In the employment context, "sex" and "gender identity" can coexist. A prohibition against firing people based on gender identity does not mean a person loses their protections from being fired based on their sex. But in the context of athletics and privacy facilities, the opposite is true, as "sex" and "gender identity" are mutually exclusive. Either the teams or the spaces are separated on the basis of sex or they are separated on the basis of gender identity, but it cannot be both. The moment that they are separated by gender identity and males are permitted on the girls' team or males are permitted in the girls' locker room, the

separation is by definition and in practice, no longer on the basis of sex.

III. Sex-based distinctions are not in tension with the best interest of students.

A. Everyone deserves to be respected. But we need not deny biological reality and undress in front of others or forgo athletic opportunities in order to show respect.

Our American experience shows that protecting athletic opportunities, preventing sexual harassment, and showing respect to all students need not be a zero-sum game. Every child deserves respect and a safe, nurturing learning environment. That is best accomplished when we give schools the tools to do what we do well in America, working together collaboratively, not in spite of but because of our differences.

Our experience with our religious differences is instructive. Many Americans find their core identity in their religious beliefs and commitments. In the context of religion, we do not force persons to agree with others' beliefs in order to show respect. Americans fervently disagree with each other on religious commitments but still maintain a mutual respect. Sometimes religious persons need accommodations for those beliefs, in schools and in the workplace, but we understand those accommodations must be reasonable, never violating others' rights. In the same way we live and work together in the context of religion, we should facilitate

a loving, respectful, nurturing environment for all students, regardless of their beliefs about gender identity. To use "respect" and "inclusivity" as reasons to justify ending sex-based distinctions in sports and privacy facilities is unreasonable, unnecessary and unjust.

Some have suggested that amici's rationale for sex-separated privacy facilities is the belief that trans-identifying students have ill-intent in desiring to use opposite-sex spaces. Likewise, they suggest that amici believe trans-identifying students are simply seeking better opportunities to win athletic events. But these are not the points amici are making; rather, they speak to this issue based on the nature of sex, bodily differences, bodily privacy, and the long list of instances where women's titles are now owned by men.

The issue, then, is not whether someone of the opposite sex may engage in a bad act, like photographing someone in an unclothed state, but the fact that it is inherently sexually harassing to allow someone of the opposite sex in an intimate space. By way of illustration, when a school tells a male maintenance worker not to replace a leaking faucet while girls are using the locker room, it is not because the school believes that maintenance workers as a class are bad people and would do something deviant. It is because the male maintenance worker's presence violates the privacy of the girls using the facility. The girls' privacy interests do not disappear based on the non-nefarious intent of the man in the privacy facility. In fact, a girl or woman's right to privacy does not spring into existence or cease to exist based on what

any male believes about himself. It belongs to her alone. And any invasion of this space by a male for facility maintenance, or by a male coach, or by any male student—whether trans-identifying or not—constitutes sexual harassment by exposing her or forcing her to see a male in an intimate space without her consent. It is difficult enough for adults to navigate sexual harassment. Our children should not be forced to do so by consequence of attending school.

While some claim that animus motivates girls to object to biological males on their sports team or students to object to sharing privacy facilities with the opposite sex, students are willing to share their teams and spaces with any gender identity so long as they are the same biological sex. The claim that female students do not want to share private spaces with biologically male trans-identifying students because they hate them is no more valid than saying the reason they do not want to share private spaces with any male is because they hate all males. What is paramount is the bodily privacy that such spaces are intended to afford. No student should have to take their clothes off in front of others to prove respect. That would be sexual harassment. And no female should be forced to forgo athletic opportunities to prove respect. That would amount to manipulation.

B. When media and activists suggest to trans-identifying kids that they are banned from sports or that people hate them, they are the ones harming children.

Shamefully, activists and some in the media seek to emotionalize the debate at the expense of students who identify as transgender. They falsely claim that board members and fellow students are against them or that sex-based policies are "anti" them, or that policies "ban them from bathrooms" or "ban them from athletics."

It is heartbreaking to see students tragically misled by these claims. These are lies and amount to shameful and manipulative attacks on children just to further opposition to a sex-based policy. Just as every student can use single-user restrooms, every student may use the multi-user restroom of their sex. Similarly, all students can play for the team of their sex. Nobody is "banned from athletics" as kids are often manipulated into believing.

Every student can be treated well and respected while maintaining sex-based differences. For example, Lily Williams, the high school girls' track team captain for her school gave testimony before the Pennsylvania House Education Committee and had this to say:

> We have been told that we need to put ourselves in the shoes of people who identify as a gender identity different from their sex. I actually agree with that, and I have really tried to do that. In fact, I'm

> committed to ensuring every girl, even if they identify as a boy or something else, are welcomed and treated well on the girls team * * *. [B]ut I ask you to put yourself in our shoes as well. I don't understand why there seems to be so little care about what this is doing to the emotional well-being of the girls. There are ways for schools to meet the needs of all students without allowing the violation of our rights to privacy and fair competition. *Any biological girl, no matter what they believe about gender, is more than welcome on our girls' teams. And any biological boy, no matter how they identify, is welcome on the boys' teams. That preserves fairness and opportunities for everyone.*

Presentation on HB 972 (Gleim) Fairness In Women's Sports Act Before the H. Comm. on Education, 2021 Leg., 205th Sess. 55 (Pa. 2021) (statement of Lily Williams, Student, Hempfield School District, Lancaster County) (emphasis added).[5]

Lily's approach captures the best of who we are as Americans. Schools have a duty to protect and serve all students. And they can create a loving, respectful, nurturing environment, including such reasonable accommodations that will serve their students, while maintaining sex-based distinctions in those places where sex-based separation is necessary for athletic opportunities, safety in athletics, and bodily privacy.

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[5] https://www.palegis.us/house/committees/committee-archives/archive-file?file=2021_0117t.pdf.

C. Gender-identity-based teams exclude and harm all female athletes, including those identifying as transgender.

Gender identity activists' solution for sports is not only bad for girls who identify as girls, but it is also bad for girls who identify as boys because this ideology suggests they should try out for the male team or simply quit altogether because of the futility in trying out for most boys' teams. In Pennsylvania, one female, who played basketball and competitive soccer for the girls' teams for years felt compelled to quit in the sophomore year after identifying as transgender. Gender ideology led the student to question, "Where do I belong, the boys' team or the girls' team? And I'm like is there an in the middle?" *6 ABC Action News: Local teen shares personal story amid debate over transgender athletes' rights* (ABC Television broadcast June 17, 2021).[6] If this student attended amici's school districts where the policy explicitly protects the right to play on the team of the student's sex, the student could have continued to play on the girls' teams for the two sports the student loved.

Most girls, even if they identify as boys, will have a difficult time making male soccer or male basketball teams, which are notoriously competitive and often make cuts of many boys who try out. Even if they were phenomenally good and made the male team, biological females would get significantly less playing time than if they continued playing on the girls' team.

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[6] https://6abc.com/post/trans-student-athletes-bucks-county-pa-bensalem-high-school-hunter-felice/10798261/.

This goes to show that gender identity activists' solution for sports is bad for all girls, no matter how they identify. The only sure winners are males who take opportunities from women and girls.

IV. Schools' sex-based policies for athletics and privacy facilities are justified by long-recognized important—even compelling—interests.

A. Sex-based distinctions are necessary for athletic opportunities and safety for female students.

Girls deserve to compete on a level playing field. Title IX was designed to stop discrimination and create equal athletic opportunities for women. Allowing males to compete in girls' sports destroys fair competition and women's athletic opportunities. It also reverses nearly 50 years of advances for women. In athletics, girls are losing medals, podium spots, public recognition, and opportunities to compete. When males compete in women-only divisions, women lose their right to a fair playing field, their safety is put at risk, their spots to participate on teams are taken, and their chances of succeeding are drastically lowered. Males who have started male puberty have a biological advantage over women, even if testosterone is later inhibited. They have denser bones, larger hearts and lungs, greater explosive strength, and are generally larger. The best way to include everyone is to keep sports separated by sex, allowing everyone to compete fairly and safely.

Title IX prohibits sex discrimination in education while specifically providing for the separation of the sexes in the common-sense circumstances of athletics. It is precisely because schools have an important interest in providing safety and competitive opportunities to girls that regulations provide that schools may operate and sponsor separate teams for members of each sex. 34 C.F.R. 106.41(b) ("[A] recipient may operate or sponsor separate teams for members of each sex where selection for such teams is based upon competitive skill or the activity involved is a contact sport."); 106.41(c) ("A recipient which operates or sponsors interscholastic, intercollegiate, club or intramural athletics shall provide equal athletic opportunity for members of both sexes.") In fact, Congress mandated, through the Javits Amendment in 1974, that these regulations be enacted for sex-based distinctions in sports.

Because Title IX and the Constitution compel schools to protect female athletics and bodily privacy, amici agree with recent action taken by the U.S. Department of Education (DOE) and U.S. Department of Justice (DOJ). DOE's Office for Civil Rights found that the University of Pennsylvania's policies and practices violated Title IX by denying women equal opportunities when permitting males to compete in women's intercollegiate athletics and to occupy women-only intimate facilities. Press Release, U.S. Dep't of Educ., U.S. Dep't of Educ. Office of Civil Rights Finds the Univ. of Pa. Has Violated Title IX

(Apr. 28, 2025).[7] Similarly, DOJ found that the California Interscholastic Federation's policy allowing males who identify as females to play on female teams deprives female students of athletic opportunities and benefits and constitutes unconstitutional sex discrimination under the Equal Protection Clause. Letter from U.S. Dep't of Justice Civil Rights Division to California Interscholastic Federation (May 28, 2025).[8]

B. Sex-based privacy facilities are necessary to protect the right to bodily privacy and prevent the sexual harassment that occurs by comingling male and female students in intimate settings.

Government advances an important—even compelling interest—when it protects private spaces from the opposite sex. To allow the opposite sex into a locker room, shower, or restroom violates the user's right to bodily privacy and creates a sexually harassing environment.

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[7] https://www.ed.gov/about/news/press-release/us-department-of-educations-office-civil-rights-finds-university-of-pennsylvania-has-violated-title-ix.

[8] https://www.justice.gov/crt/media/1401776/dl?inline.

1. Sex-separated privacy facilities are justified by our right to bodily privacy from members of the opposite sex.

The notion that biological men should be permitted to be in women's intimate spaces (and vice versa) is a recent phenomenon; conversely, the principle of sex-based protections in these settings for the sake of bodily privacy is longstanding in our legal tradition. "[A]ll individuals possess a privacy interest when using restrooms or other spaces in which they remove clothes and engage in personal hygiene, and this privacy interest is heightened when persons of the opposite sex are present." *Adams* v. *Sch. Bd. of St. Johns Cty.*, 57 F.4th 791, 804 (11th Cir. 2022) (quoting *Grimm* v. *Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 636 (4th Cir. 2020) (Niemeyer, J., dissenting)). See also *Doe* v. *Boyertown Area Sch. Dist.*, 897 F.3d 518, 527 n.53 (3d Cir. 2018) (recognizing a constitutional right to "privacy in a person's unclothed or partially clothed body."); *Poe* v. *Leonard*, 282 F.3d 123, 136 (2d Cir. 2002) ("[T]here is a right to privacy in one's unclothed or partially clothed body."); *York* v. *Story*, 324 F.2d 450, 455 (9th Cir. 1963) ("The desire to shield one's unclothed figure from view of strangers, and particularly strangers of the opposite sex, is impelled by elementary self-respect and personal dignity.").

On these principles rests "society's undisputed approval of separate public restrooms for men and women based on privacy concerns. The need for privacy justifies separation[.]" *Faulkner* v. *Jones*, 10

F.3d 226, 232 (4th Cir. 1993). That is why "same-sex restrooms [and] dressing rooms" are allowed "to accommodate privacy needs" and why "white only rooms," which have no basis in bodily privacy, are illegal. *Chaney* v. *Plainfield Healthcare Ctr.*, 612 F.3d 908, 913 (7th Cir. 2010). Indeed, females "using a women's restroom expect[] a certain degree of privacy from * * * members of the opposite sex." *State* v. *Lawson*, 340 P.3d 979, 982 (Wash. App. 2014). Specifically, teenagers are "embarrass[ed] * * * when a member of the opposite sex intrudes upon them in the lavatory." *St. John's Home for Children* v. *W. Va. Human Rights Comm'n*, 375 S.E.2d 769, 771 (W. Va. 1988).

Girls are exploited by public authorities when schools expect them to change clothes or do any of the activities that are uniquely appropriate inside of a girls' restroom, locker room, or shower facility while a male is present. Societies have long suffered from women and girls being manipulated to meet or satisfy male expectations. Yet, policy and practice in many schools effectively teach girls that a male's beliefs about himself are more important than the girls' dignity, privacy, and sexual autonomy. Schools should never manipulate girls as objects to affirm boys' beliefs about their own sexual identities.

For girls, encountering any boy in a vulnerable place where they may be undressed can be a traumatic experience and, for sexual assault survivors, it can trigger further psychological injury. *Bostock* v. *Clayton County*, 590 U.S. 644, 725-26 (2020) (Alito, J., dissenting). Moreover, the increased vividness accompanying real-time exposure to a

person of the opposite sex who is naked or in their underwear is even more arousing than a mere picture, and knowing that a member of the opposite sex obtained such a potentially arousing and unconsented-to image can be deeply troubling to those who have been exposed. By exempting privacy facilities from the general prohibition of sex discrimination in Title IX, Congress acted to eliminate that harm, as well as to protect the privacy and modesty interests of vulnerable students, a right of constitutional dimension.

Because of bodily privacy protections, schools cannot force the minors in their care to endure the risk of unconsented intimate exposure to the opposite sex as a condition for using the very facilities set aside to protect their privacy from the opposite sex. Nor should they. "[P]rivacy matters" to children and is "central to their development and integrity." Samuel T. Summers, Jr., *Keeping Vermont's Public Libraries Safe: When Parents' Rights May Preempt Their Children's Rights*, 34 VT. L. REV. 655, 674 (2010) (quoting Ferdinand Schoeman, *Adolescent Confidentiality and Family Privacy*, in PERSON TO PERSON 213, 219 (George Graham & Hugh Lafollette eds., 1989)). Allowing opposite-sex persons to view adolescents in restrooms and locker rooms, risks their "permanent emotional impairment" under the mere "guise of equality." *City of Philadelphia* v. *Pa. Human Relations Comm'n*, 300 A.2d 97, 103 (Pa. Commw. Ct. 1973).

Schools have separate facilities for boys and girls to protect students' bodily privacy rights. "Unquestionably, a girls' locker room is a place where

a normal female should, and would, reasonably expect privacy, especially when she is performing quintessentially personal activities like undressing, changing clothes, and bathing." *People* v. *Grunau*, No. H015871, 2009 LEXIS 10325, *8 (Cal. Ct. App. Unpub., Dec. 29, 2009). Grunau argued that briefly viewing a teenager showering in a full swim suit, the same thing she was wearing while swimming where members of both sexes could see her, would not shock or irritate the average person. The *Grunau* court vigorously disagreed: "[A] normal female who was showering in a girls locker room would unhesitatingly be shocked, irritated, and disturbed to see a man gazing at her, no matter how briefly he did so." *Id*. at *8-9. It further explained: "defendant blithely ignores an important fact: where his conduct took place * * *. [The victim] was on a high school campus, out of general public view, and inside a girls' locker room, a place that by definition is to be used exclusively by girls and where males are not allowed." *Id*. at 8.

The important constitutional principle of bodily privacy should not be discarded even as we seek to eliminate class-based distinctions. For instance, in the context of a case involving a sex-based admissions policy, this Court noted that "[a]dmitting women to the Virginia Military Institute would undoubtedly require alterations necessary to afford members of each sex privacy from the other sex in living arrangements[.]" *United States* v. *Virginia*, 518 U.S. 515, 551 n.19 (1996). In the same way, schools must treat trans-identifying students, like all students, with dignity and respect. But schools cannot ignore important bodily privacy issues any more than the

Virginia Military Institute could do so when eliminating sex-based distinctions on that campus.

Students should never encounter members of the opposite sex while disrobing, showering, urinating, defecating, and, in the case of females, while changing tampons and feminine napkins. The axiomatic nature of this statement is multiplied when the student is a minor in a custodial setting. This is no doubt why federal law encourages sex based restrictions. See *e.g.*, 20 U.S.C. 1686 (providing for separate living facilities) and 34 C.F.R. 106.33 (providing for separate bathrooms). These are consistent with our long history of separating privacy facilities on the basis of sex due to the anatomical differences of the two sexes. While sex-based distinctions are subject to heightened scrutiny, the government's interest in protecting bodily privacy justifies the distinction. See, e.g., *Chaney*, 612 F.3d at 913.

2. Sex-separated facilities are necessary to prevent sexual harassment.

Putting students in a place where they will find themselves undressed in the presence of a member of the opposite sex, or observing a member of the opposite sex who is undressed, constitutes harassment that is so "severe, pervasive, or objectively offensive" as to undermine their educational experience. See, e.g., *DeJohn* v. *Temple Univ.*, 537 F.3d 301, 316 n.14 (3d Cir. 2008) (setting forth the harassment standard under Title IX). It is harassment to expect students, themselves minors, to navigate these traumatic situations created by some schools.

As discussed in section IIIa, *supra*, the policy itself creates the harassing environment. There is no need for an additional bad act by the male. For instance, a policy would create a harassing environment if it allows male maintenance workers to enter the women's locker room while women are undressed to unclog a drain, and this principle is no less true when a male identifies as female or nonbinary and enters a female privacy facility.

Litigants need not show that harassment is severe, pervasive, *and* objectively offensive, but only that it is "severe, pervasive, *or* objectively offensive," *DeJohn*, 537 F.3d at 316 n.14 (emphasis added), but when schools adopt these policies, it is all three. The official expectation that children of the opposite sex undress in front of each other is both severe and objectively offensive. And a school policy that invites such conduct, as opposed to a random and unwanted occurrence at a school, is by definition pervasive. Finally, this detracts from students' educational experience because they are effectively denied access to school resources that are set apart for their sex due to the anatomical differences between the sexes.

Schools that open privacy facilities to the opposite sex subject their students to sexual harassment. Like most forms of sexual harassment, there is an unhealthy power differential between schools and the students who are pressured to share privacy facilities in this way. Many students are exceedingly uncomfortable, but at that age they would often rather endure the sexual harassment than risk the harassment and stigma that comes with going against the authority of their school on this issue. Students

should not have to navigate sharing privacy facilities, places that are set apart for the removal of clothing outside of the presence of the opposite sex. The government's interest in preventing this kind of sexual harassment is sufficient to justify sex-based separation of privacy facilities.

CONCLUSION

Some schools assert that a transgirl is a girl like any other girl. Therefore, they deny girls opportunities in sports, privacy in intimate spaces, and even go so far as to provide no warning that a male is sharing intimate spaces. A compassionate society does not deny biological reality. All students are served when we recognize and protect sex-based categories. Nobody is denied the ability to play sports or use a restroom under sex-based policies. Everyone is respected.

This Court should clarify that sex-based distinctions are not only permissible but necessary for both athletics and facility use. These are among the very issues that the *Bostock* Court implicitly and explicitly said would be taken up on another day since *Bostock* did not "purport to address bathrooms, locker rooms, or anything else of the kind." *Bostock* v. *Clayton County*, 590 U.S. 644, 681 (2020). School districts and other governmental bodies deserve the assurance when they are seeking to carry out their duties—preserving athletic opportunities, safety, and fairness for females and preventing sexual harassment by protecting bodily privacy—that they are doing so in compliance with both Title IX and the Constitution.

DATED this 19th day of September, 2025.

Respectfully submitted,

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APPENDIX TABLE OF CONTENTS

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Zachary Kile
Justin Kovach
Carrie Lawson
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Donna Wert
Joe Wilson
Carmen Witmer
Justin Wolgemuth
Jarod Yost